Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Petitioner,

v.

ELLEN GAYLE MOORE, FANNIE McCONNELL, SPENCER WILLIAMS, and ANITA BOWERS, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 42 U.S.C. § 1988(a) require courts to borrow state law doctrines, such as rules of repose, that are separate from the statute of limitations but nonetheless govern the timeliness of claims?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Liberty National Life Insurance Company is wholly owned by Torchmark Corporation.

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Petitioner Liberty National Life Insurance Company respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion (App. 1a–27a) is reported at 267 F.3d 1209. The District Court's opinion (App. 28a–49a) is reported at 108 F. Supp. 2d 1266.

STATEMENT OF JURISDICTION

The Eleventh Circuit entered its judgment on September 28, 2001 (App. 1a), and the court denied Liberty National's timely petition for rehearing on November 26, 2001 (App. 50a–51a). Liberty National invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves the scope of the civil rights borrowing statute, 42 U.S.C. § 1988(a), which applies to claims brought under the Reconstruction Civil Rights Acts, 42 U.S.C. §§ 1981–1983, 1985–1987, and 1989–1994. Section 1988(a) provides:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24,[1] and 70 of the Revised Statutes

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1. Title 24 of the Revised Statutes was in the original "Title 'CIVIL RIGHTS,'" meaning title 24 of the Revised Statutes, consisting of R.S. sections 1977 to 1991, which correspond to 42 U.S.C. §§ 1981 to 1983, 1985 to 1987, and 1989 to 1994.

> for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

STATEMENT OF THE CASE

This case is a putative nationwide class action brought on behalf of more than a half-century's worth of Liberty National policyholders under two sections of the Reconstruction Civil Rights Acts, 42 U.S.C. §§ 1981 & 1982, and 28 U.S.C. § 1331. *See* App. 2a. The complaint accuses Liberty National of discriminating on the basis of race by charging African-American insureds higher premiums than it charged white insureds on policies sold from 1940 until the mid-1970s. *See* App. 3a.

The named Plaintiffs are African Americans who purchased insurance policies from Liberty National at least 25 years before they filed their complaint on December 8, 1999. Their claims arise from insurance policies purchased

in 1975, 1974, 1970, 1969, 1965, and 1954. First Am. Compl. ¶¶ 61, 64, 68, 71. Plaintiffs seek compensatory and punitive damages, plus declaratory and injunctive relief. *Id.* prayer.

In response to the complaint, Liberty National moved for judgment on the pleadings on the ground that Alabama's 20-year rule of repose absolutely barred all the Plaintiffs' claims. The District Court initially dismissed the complaint as untimely (*see* App. 30a), but subsequently allowed Plaintiffs to file an amended complaint under §§ 1981 and 1982 (App. 49a), after dismissing all but one of their state law claims with prejudice under Alabama's rule of repose (App. 43a & n.7). The District Court exempted Plaintiffs' civil rights claims from the repose bar, however, holding that "Alabama's common-law rule of repose is not applicable to the federal law claims of the Plaintiffs." App. 43a.

Following 28 U.S.C. § 1292(b) certification by the District Court (*see* App. 5a), the Eleventh Circuit granted Liberty National permission to appeal and affirmed the ruling of the District Court, holding that "Alabama's rule of repose does not apply to [P]laintiffs' §§ 1981 and 1982 claims" (App. 2a). The Eleventh Circuit's ruling rests on two conclusions. First, the court concluded § 1988(a) does not require borrowing of Alabama's rule of repose because, under *Felder v. Casey*, 487 U.S. 131, 140 (1988), the rule is neither a "universally familiar" aspect of litigation nor "indispensable to any scheme of justice." App. 9a–11a, 18a. Second, the court determined Alabama's rule of repose is distinct from, not integral to, the State's statute of limitations and thus need not be borrowed under § 1988(a). App. 12a–19a.

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit's decision creates a direct split of authority with the Alabama Supreme Court and aggravates the existing uncertainty among the United States courts of appeals over whether state or federal law supplies the timeliness rules under § 1988(a).

In holding that Alabama's rule of repose does not apply to Reconstruction Civil Rights Act claims, the Eleventh Circuit created a direct split of authority with a prior decision of the Alabama Supreme Court. In *Ex parte Grubbs*, 542 So. 2d 927 (Ala. 1989), the Alabama Supreme Court faced the same issue but reached the opposite conclusion. The petitioner in *Grubbs* was an African American who asserted a claim under 42 U.S.C. § 1983 against the Alabama State Bar, challenging the denial of his right to attend the University of Alabama School of Law because of his race. *Id.* at 928. The Alabama Supreme Court held the rule of repose "absolutely barred" the petitioner's civil rights claim because more than 20 years had passed between the denial of his admission in 1949 and his assertion of the claim in 1986. *Id.* at 930–31. According to the court, "[t]here must be a time beyond which human transactions will not be inquired into." *Id.* at 931 (internal quotation omitted).

The Eleventh Circuit's decision that Alabama's rule of repose does not apply to Plaintiffs' claims under §§ 1981 and 1982 conflicts with the Alabama Supreme Court's contrary holding in *Grubbs*.[2] Although the Eleventh Circuit recognized that "the events giving rise to each of the

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2. The borrowing analysis under § 1988(a) is the same, regardless of whether the claims are brought under § 1981, § 1982, or § 1983. *See* n.1, *supra*; *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660 (1987).

[P]laintiffs' claims are more than twenty years old" (App. 7a), the court refused to apply Alabama's rule of repose to Plaintiffs' civil rights claims because, it reasoned, § 1988(a) did not require it (App. 18a–19a).

This conflict between the Eleventh Circuit and the Alabama Supreme Court is irreconcilable. Since the Eleventh Circuit's decision in this case, the Alabama Supreme Court has reaffirmed its holding in *Grubbs* that the rule of repose applies "in the context of a civil-rights violation claim under 42 U.S.C. § 1983." *Ex parte Liberty Nat'l Life Ins. Co.*, __ So. 2d __, 2002 WL 64651, *4 (Ala. Jan. 18, 2002).

This conflict over whether § 1988(a) borrows Alabama's rule of repose means the timeliness of §§ 1981, 1982, and 1983 claims now depends solely upon whether they are brought in state or federal court. Under the Eleventh Circuit's decision, a host of antiquated contract, property, and personal injury claims long barred by repose are now viable under the Reconstruction Civil Rights Acts, provided they are filed in federal court. This result undermines the federalism concerns that support § 1988(a) by creating a federal civil rights exception to an otherwise applicable principle of Alabama law. *See Board of Regents v. Tomanio*, 446 U.S. 478, 491–92 (1980). Certiorari review by this Court is necessary to resolve the Eleventh Circuit's and the Alabama Supreme Court's irreconcilable views on whether § 1988(a) applies to the rule of repose.

The conflict of authority on the scope of § 1988(a) is not isolated to the particular question addressed by the Eleventh Circuit and the Alabama Supreme Court. The United States courts of appeals have also taken inconsistent positions on whether § 1988(a) borrows state law rules, separate from the statute of limitations itself, that nonetheless determine when

the right to maintain a cause of action ends. All of these conflicts stem from the fact that this Court's prior decisions have not addressed whether § 1988(a) applies outside the context of statutes of limitations, tolling, and survival of actions. *See, e.g.*, *Wilson v. Garcia*, 471 U.S. 261, 271, 276 (1985) (statute of limitations); *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 463–64 (1975) (tolling); *Robertson v. Wegmann*, 436 U.S. 584, 588–89 (1978) (survival of actions). Because this Court has never enunciated a comprehensive standard on when state timeliness rules separate from the statute of limitations apply to claims under the Reconstruction Civil Rights Acts, "[t]he scope of § 1988 remains in considerable doubt." *Delesma v. City of Dallas*, 770 F.2d 1334, 1337 n.5 (5th Cir. 1985). The existing uncertainty over the scope of § 1988(a) is best exemplified by the conflict between the Eleventh Circuit and the Alabama Supreme Court, yet two other well-defined circuit splits have arisen over whether state or federal law controls two similar rules that recur most often in civil rights cases.

The first issue that has split the circuits is whether a civil rights claim is timely because it is considered part of a series of continuing violations. When faced with this issue, the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits apply a federal continuing violation rule, but the Fourth and Tenth Circuits refuse to apply such a federal common law rule. *Compare Heard v. Sheahan*, 253 F.3d 316, 320 (7th Cir. 2001), *287 Corporate Ctr. Assocs. v. Township of Bridgewater*, 101 F.3d 320, 324 (3d Cir. 1996), *Cornwell v. Robinson*, 23 F.3d 694, 703–04 (2d Cir. 1994), *Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 510–11 (6th Cir. 1991), *Chung v. Pomona Valley Cmty. Hosp.*, 667 F.2d 788, 791 (9th Cir. 1982), *Neel v. Rehberg*, 577 F.2d 262, 264 (5th Cir. 1978), *Allen v.*

Amalgamated Transit Union Local 788, 554 F.2d 876, 880 (8th Cir. 1977), *and Macklin v. Spector Freight Sys., Inc.*, 478 F.2d 979, 994 (D.C. Cir. 1973), *overruled on other grounds by Johnson*, 421 U.S. at 457 n.4, *with Thomas v. Denny's, Inc.*, 111 F.3d 1506, 1513–14 (10th Cir. 1997), *and Kornegay v. Burlington Indus., Inc.*, 803 F.2d 787, 788 (4th Cir. 1986).

The second issue that has split the circuits is whether a defendant's own actions equitably estop it from invoking the statute of limitations to bar a civil rights claim. On this issue, the First and Seventh Circuits apply a federal rule of equitable estoppel, but the Second and Fifth Circuits borrow the rule from state law. *Compare Shropshear v. Corporate Counsel of Chicago*, 275 F.3d 593, 598 (7th Cir. 2001), *and Benitez-Pons v. Puerto Rico*, 136 F.3d 54, 63 (1st Cir. 1998), *with Cross v. Lucius*, 713 F.2d 153, 157–58 (5th Cir. 1983), *and Keating v. Carey*, 706 F.2d 377, 382 (2d Cir. 1983). *See also Bell v. Fowler*, 99 F.3d 262, 266–67 & n.3 (8th Cir. 1996) (recognizing the split of authority and leaving the issue unresolved, but noting that Supreme Court precedent strongly indicates a state rule should be borrowed); *Cange v. Stotler & Co., Inc.*, 826 F.2d 581, 599–600 (7th Cir. 1987) (Easterbrook, J., concurring) (criticizing the Seventh Circuit's position, which allows "a court to pick a tolling rule from state law and an estoppel rule from federal law," as inconsistent with Supreme Court precedent).

These conflicting authorities on the scope of § 1988(a) demonstrate the need for this Court to review the Eleventh Circuit's decision. An important issue at the outset of civil rights litigation is deciding whether the suit is timely. And the choice between borrowing state law or applying federal common law often determines the outcome. Without

instruction from this Court on how broadly § 1988(a) applies, court decisions on timeliness issues such as repose, continuing violations, and equitable estoppel will continue to diverge. A decision from this Court establishing a governing standard on the scope of § 1988(a) will not only resolve the direct split of authority between the Eleventh Circuit and the Alabama Supreme Court over Alabama's rule of repose, but it will also provide necessary guidance to resolve the conflicts among the federal circuits over whether § 1988(a) borrows similar timeliness rules.

II. The Eleventh Circuit's decision conflicts with this Court's decisions holding that § 1988(a) measures the timeliness of federal civil rights claims by state law.

The Eleventh Circuit's narrow application of § 1988(a) seems inconsistent with the borrowing analysis suggested by this Court's prior decisions. In creating a federal common law exception to Alabama's rule of repose under § 1988(a), the Eleventh Circuit failed to follow this Court's consistent statements that courts must borrow state law to decide whether causes of action under the Reconstruction Civil Rights Acts are timely. *See Hardin v. Straub*, 490 U.S. 536, 538–44 (1989); *Wilson*, 471 U.S. at 271 (1985); *Tomanio*, 446 U.S. at 483–92; *Johnson*, 421 U.S. at 462–64; *O'Sullivan v. Felix*, 233 U.S. 318, 324–25 (1914). Because "existing federal law will not cover every issue that may arise in the context of a federal civil rights action," *Moor v. County of Alameda*, 411 U.S. 693, 702 (1973), this Court has directed courts to "rely[] on the State's wisdom in setting a limit . . . on the prosecution of a closely analogous claim" by borrowing the forum State's statute of limitations, along with its "interrelated . . . provisions regarding tolling, revival, and questions of application," *Johnson*, 421 U.S. at 464. Thus,

federal law relies on the forum State's judgment as to the "point at which the delay of a plaintiff in asserting a claim is sufficiently likely either to impair the accuracy of the fact-finding process or to upset settled expectations that a substantive claim will be barred." *Tomanio*, 446 U.S. at 487. *Accord Wilson*, 471 U.S. at 271. Borrowing state law in this context is not only consistent with the express language of § 1988(a), which makes state timeliness rules "binding rules of law," but it also fosters principles of "federalism" by not "displac[ing] the state rule in favor of an ad hoc federal rule." *Tomanio*, 446 U.S. at 484, 491–92.

To avoid borrowing Alabama's rule of repose in this case, the Eleventh Circuit first concluded the absence of a rule of repose in federal civil rights law was not a "deficiency" that required resort to state law under § 1988(a). App. 9a, 11a, 18a. This conclusion rests on a misreading of *Felder v. Casey*, 487 U.S. 131 (1988). The Eleventh Circuit reasoned Alabama's rule of repose does not apply to §§ 1981 and 1982 claims because, under *Felder*, such a rule is neither a "universally familiar" aspect of litigation nor "indispensable to any scheme of justice." App. 9a (quoting *Felder*, 487 U.S. at 140), 11a. But *Felder* provides no support for these two new prerequisites to borrowing under § 1988(a). As Justice O'Connor observed in her *Felder* dissent, the preemption holding in *Felder* rested on the Supremacy Clause, not § 1988(a). 487 U.S. at 161–62 (O'Connor, J., dissenting) ("'Borrowing' cases under 42 U.S.C. § 1988 . . . . offer[] no support for what the Court does today.").

This Court has never required a state law rule to be "universally familiar" and "indispensable to any scheme of justice" before § 1988(a) applies. *See Hardin*, 490 U.S. at 538 (observing § 1988(a) fills the "gaps in federal civil rights

acts" with "state law"); *Tomanio*, 446 U.S. at 483 (describing deficiency under § 1988(a) as "a void" in federal law); *Robertson*, 436 U.S. at 588–89 (explaining federal law is "deficient" when it simply does not cover a "specific area"); *Moor*, 411 U.S. at 702–03 (same). To the contrary, this Court has often borrowed state law rules that were no more unusual, arcane, or unique than Alabama's rule of repose. If the Eleventh Circuit's application of § 1988(a) were correct, then this Court would have never borrowed New York's rule that the statute of limitations continues to run while the plaintiff pursues related litigation, Puerto Rico's rule that the full limitations period begins to run anew following denial of class certification, or Tennessee's rule that limitations on a prisoner's claims are tolled during the entire period of his incarceration. *See Tomanio*, 446 U.S. at 486–92; *Chardon v. Fumero Soto*, 462 U.S. 650, 655–62 (1983); *Hardin*, 490 U.S. at 538–44. The lesson of *Tomanio*, *Chardon*, and *Hardin* is that courts must follow the forum State's law on whether a claim is timely filed, no matter how unusual the rule and regardless of whether it "causes the plaintiff to lose the litigation." *Tomanio*, 446 U.S. at 488 (quoting *Robertson*, 436 U.S. at 593).

The Eleventh Circuit's reliance on *Felder* to disregard Alabama's rule of repose is also inconsistent with this Court's repeated statements that § 1988(a) does not require nationwide uniformity. *See Hardin*, 490 U.S. at 544 n.14; *Chardon*, 462 U.S. at 657 & n.9, 662; *Tomanio*, 446 U.S. at 489; *Robertson*, 436 U.S. at 593 n.11. Instead, § 1988(a) only requires "uniformity within each State." *Wilson*, 471 U.S. at 275. *Accord Parkerson v. Carrouth*, 782 F.2d 1449, 1453 (8th Cir. 1986) (recognizing § 1988(a) "does not require courts to compare the laws of one state with those of another

state . . . or to use some as yet undefined measure to determine whether a state rule . . . is overly restrictive"). Yet the Eleventh Circuit decision imposes a nationwide uniformity requirement on § 1988(a), a holding that will result in inconsistent results within the State of Alabama. This erroneous reading of *Felder* in the § 1988(a) context is not isolated to the Eleventh Circuit. The Ninth Circuit has made the same mistake. *See Botefur v. City of Eagle Point*, 7 F.3d 152, 155–56 (9th Cir. 1993). Review by this Court is necessary to stem this growing misreading of *Felder*.

The Eleventh Circuit's second legal conclusion is based on an equally erroneous reading of this Court's decision in *West v. Conrail*, 481 U.S. 35, 39–40 (1987). Citing *West*, the Eleventh Circuit concluded § 1988(a) "borrow[s] nothing from state law other than the terms of the statute [of limitations] itself and closely related state law principles intrinsic to its appropriate application, such as tolling doctrines." App. 13a (citing *West*, 481 U.S. at 39–40). The Ninth Circuit has adopted the same restrictive reading of § 1988(a), ostensibly on the authority of *West*. *See TwoRivers v. Lewis*, 174 F.3d 987, 991–92 (9th Cir. 1999). Yet *West* provides no support for this conclusion; it involved federal common law borrowing in the labor context, not § 1988(a). *See* 481 U.S. at 37. This Court's subsequent decision in *Hardin v. Straub* established that § 1988(a) borrowing is not so narrowly circumscribed, reiterating that "[c]ourts should not unravel state limitations rules unless their full application would defeat the goals of the federal statute at issue." 490 U.S. at 539. *See* 19 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4519, at 634 (1996). Notably, the Court's opinion in *Hardin* did not cite *West*. This Court should review the decision of the Eleventh Circuit to ensure that courts follow *Hardin*, not *West*, when applying § 1988(a).

Finally, the Eleventh Circuit erred in finding Alabama's rule of repose is not sufficiently interrelated with the statute of limitations to necessitate borrowing it under § 1988(a). This Court's decision in *Robertson v. Wegmann* demonstrates there are a number of state rules, such as those governing the survival of claims, that are separate from the statute of limitations but nevertheless govern the viability of a civil rights claim. *See* 436 U.S. at 588–89. Alabama's rule of repose is the same type of rule. It, like the Louisiana survival rule borrowed in *Robertson*, operates in tandem with the statute of limitations to set an absolute limit on the right to bring a claim. *See Liberty National*, 2002 WL 64651, at *3 ("Since 1858, causes of action asserted in Alabama courts more than 20 years after they could have been asserted have been considered to have been extinguished by the rule of repose."); *cf. Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 362 n.8 (1991) (finding no support for borrowing the 1934 Securities Exchange Act's statute of limitations without the accompanying period of repose and observing "such a practice comes close to the type of judicial policymaking that our borrowing doctrine was intended to avoid"). The Eleventh Circuit's decision to borrow one without the other conflicts with both the decisions of this Court and the State of Alabama's judgment on what claims are too stale to be actionable.

CONCLUSION

Because the Eleventh Circuit's decision in this case conflicts with § 1988(a)'s broad command to borrow state law, with the Alabama Supreme Court's decision on the same issue, and with this Court's precedent, Liberty National asks this Court to grant the petition.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 28, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-14507

D.C. Docket No. 99-03262-CV-BU-S

ELLEN GAYLE MOORE, on Behalf of Themselves and all Others Similarly situated, FANNIE McCONNELL, on Behalf of Themselves and all Others Similarly Situated, et al,

Plaintiffs-Appellees,

versus

LIBERTY NATIONAL LIFE INSURANCE COMPANY,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Alabama

(September 28, 2001)

Before BIRCH, WILSON and FARRIS*, Circuit Judges.

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* Honorable Jerome Farris, U.S. Court of Appeals for the Ninth Circuit, sitting by designation.

Appendix A

WILSON, Circuit Judge:

Liberty National Life Insurance Company (Liberty National) appeals the district court's denial of its motion for judgment on the pleadings on plaintiffs' civil rights claims, filed pursuant to 42 U.S.C. §§ 1981 and 1982. Plaintiffs, a putative class of African Americans that purchased life insurance policies from Liberty National over the last sixty years, allege that Liberty National maintained a policy of charging higher premiums and paying lower benefits to African Americans than to whites. Liberty National contends that plaintiffs' claims are barred by both Alabama's applicable statute of limitations and Alabama's common law doctrine of repose. Liberty National further argues that §§ 1981 and 1982 frustrate Alabama's statutory scheme of insurance regulation and are thus reverse-preempted by the McCarran-Ferguson Act. Of these three distinct contentions, the district court certified only one for the instant interlocutory appeal: whether Alabama's doctrine of repose applies to, and therefore bars, plaintiffs' federal civil rights claims. On this issue, we conclude that Alabama's rule of repose does not apply to plaintiffs' §§ 1981 and 1982 claims. While we enjoy the discretion to decline to consider either of the two issues not certified for interlocutory appeal, we do have the jurisdiction to address those claims if we choose. We address and reject Liberty National's contention that the McCarran-Ferguson Act mandates the reverse-preemption of plaintiffs' §§ 1981 and 1982 claims. We decline to address plaintiffs' statute of limitations argument, as we do not feel it appropriate for review at this time. Therefore, we affirm the district court's denial of Liberty National's motion for judgment on the pleadings.

Appendix A

BACKGROUND

On December 8, 1999, four African American policyholders filed a class action complaint in the federal district court for the Northern District of Alabama, alleging that Liberty National engaged in racial discrimination by targeting low income African Americans and selling them industrial life insurance policies with higher premiums and lower benefits than those sold to whites. In their complaint, plaintiffs alleged that Liberty National sold policies in a racially discriminatory fashion from 1940 to the mid-1970s and that Liberty National continued to collect premiums on those policies until within two years of the filing of the complaint. The complaint alleged claims under § 1981, which prohibits racial discrimination in contractual relations, and also included a variety of state law claims.

Liberty National moved for judgment on the pleadings, and on April 7, 2000, the district court granted its motion. The district court ruled that the § 1981 claims accrued at the time the insurance contracts were made and therefore were barred by Alabama's two-year statute of limitations for personal injury torts. The court found that plaintiffs had not alleged fraudulent concealment with sufficient particularity to toll the statute of limitations. The court thus dismissed plaintiffs' state law claims without prejudice to refiling in state court and dismissed the § 1981 claim with prejudice.

On April 21, 2000, plaintiffs filed a motion to alter or amend the judgment and also sought leave to file an amended complaint. Plaintiffs presented a proposed amended complaint to the court, which made specific allegations that

Liberty National fraudulently concealed its alleged misconduct, and added claims under § 1982, which prevents racial discrimination in the maintenance of property. Plaintiffs contended that the proposed revisions repaired the deficiencies in the initial complaint and thus asked the court to reconsider its previous ruling dismissing the case on the pleadings (assuming the court granted plaintiffs leave to amend their complaint).

On July 3, 2000, after hearing oral argument, the district court granted plaintiffs' motion to alter or amend the April 7th order and also granted plaintiffs leave to file an amended complaint. The court found that the proposed amended complaint alleged with particularity (as that term is defined in Federal Rule of Civil Procedure 9(b)) that Liberty National fraudulently concealed the information that gave rise to plaintiffs' claims. The court held that the two-year statute of limitations would be tolled under Alabama law if these specific allegations were true.

Liberty National argued that even if the complaint could not be dismissed at the pleadings stage on the basis of the statute of limitations, Alabama's common law rule of repose would operate to bar plaintiffs' claims. The court found that the state rule of repose, which bars any suit arising out of any event more than twenty years old, barred all but one of plaintiffs' state law claims. In contrast, the court held that the state rule of repose was inapplicable to plaintiffs' federal civil rights claims. The court noted that statutes of limitations are essential features of any cause of action, and because § 1981 does not contain a statute of limitations, federal courts must borrow the applicable limitations period from state law.

However, the court determined that absolute rules of repose are not necessary components of federal causes of action, so applying them to federal civil rights claims is unnecessary and improper.

Finally, the court rejected Liberty National's claim that §§ 1981 and 1982 frustrated the purposes of Alabama's scheme of insurance regulation and thus ran afoul of the McCarran-Ferguson Act.

Liberty National moved for permission to file an interlocutory appeal, and the district court granted that motion, certifying the following question for our consideration:

> Whether Alabama's 20 year common law rule of repose bars the Plaintiffs in this action from pursuing federal claims under 42 U.S.C. §§ 1981 & 1982.

Liberty National promptly filed the instant interlocutory appeal.

DISCUSSION

A.

We review a district court's denial of "a judgment on the pleadings *de novo*." *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir.1998). Judgment on the pleadings is appropriate only when "the plaintiff can prove no set of facts in support of his claim which would entitle him to

relief." *Id.* (internal quotation marks omitted). We must accept all facts in the complaint as true and "view them in the light most favorable to the" plaintiffs. *Id.*

Liberty National's first contention in this appeal is that 42 U.S.C. § 1988(a) requires the application of Alabama's common law rule of repose to plaintiffs' §§ 1981 and 1982 claims. This claim presents an issue of law that is reviewed de novo. *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1334 (11th Cir.), *cert. denied*, 528 U.S. 931 (1999). To put Liberty National's contention in context, we turn first to some background on Alabama's repose doctrine.

Alabama's judicially created rule of repose serves to bar claims that arise out of events that are more than twenty years old. *Ex parte Grubbs*, 542 So. 2d 927, 930-31 (Ala.1989). Alabama's rule of repose " 'is similar to a statute of limitations, but [is] not dependent upon one,' " and has a greater breadth than any such statute. *McDurmont v. Crenshaw*, 489 So. 2d 550, 552 (Ala.1986) (quoting *Boshell v. Keith*, 418 So. 2d 89, 91 (Ala.1982)). Unlike a statute of limitations, "the only element of the rule of repose is time." *Boshell*, 418 So. 2d at 91. "[The rule of repose] is not affected by the circumstances of the situation, by personal disabilities, or by whether prejudice has resulted or evidence obscured." *Id.* There is some debate in Alabama law concerning the types of claims to which the doctrine is applicable. It is unclear, for example, whether the rule applies to personal injury actions. *Spain v. Brown & Williamson Tobacco Corp.*, 230 F.3d 1300, 1307 (11th Cir.2000) (acknowledging uncertainty about the scope of actions to which the rule of repose applies). However, it is clear that any claim in Alabama courts, brought

more than twenty years after the time when it first could have been, is barred if the rule of repose applies. *Boshell*, 418 So. 2d at 91. The Alabama Supreme Court articulated the rationale for the rule as follows:

> As a matter of public policy ... it has long been the settled policy of this state . . . that antiquated demands will not be considered by the courts . . . . It is necessary for the peace and security of society that there should be an end of litigation, and it is inequitable to allow those who have slept upon their rights for a period of 20 years . . . to demand an accounting.

Snodgrass v. Snodgrass, 58 So. 201, 201-02 (Ala. 1912).

Liberty National argues that the repose doctrine must be applied to bar plaintiffs' §§ 1981 and 1982 claims, as the events giving rise to each of the plaintiffs' claims are more than twenty years old. The governing statute concerning the appropriate rules of decision for the Reconstruction-era Federal Civil Rights Acts is codified at 42 U.S.C. § 1988(a). To evaluate Liberty National's argument, we turn first to the text of § 1988(a) itself:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are

> suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

42 U.S.C. § 1988(a).

The Supreme Court has interpreted this language as mandating " 'a three-step process' in determining the rules of decision applicable to civil rights claims" brought pursuant to the Reconstruction-era Civil Rights Acts. *Wilson v. Garcia*, 471 U.S. 261, 267 (1985). First, courts are to look to the civil rights statutes themselves and determine if those statutes contain deficiencies that render them impossible to effect. *Id.*; *Robertson v. Wegmann*, 436 U.S. 584, 587 (1978). If the statutes contain such a deficiency, then the courts should fill the gap by looking to the common law of the forum state and borrowing the appropriate state law rule. *Wilson*, 471 U.S. at 267. Finally, courts can apply the state common law rule only if it "is not inconsistent with the Constitution and laws of the United States." 42 U.S.C. § 1988(a); *Wilson*, 471 U.S. at 267.

Applying this analytic framework to the instant case, we first must ask whether §§ 1981 and 1982 "are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law." 42 U.S.C. § 1988(a). Liberty National notes that §§ 1981 and 1982 lack a blanket rule of repose similar to the one that has developed in Alabama. Liberty National argues that this absence amounts to a deficiency (as that term is defined by § 1988) that must be remedied through reference to state law.

When determining whether the Reconstruction-era Civil Rights Acts are deficient in some manner that requires borrowing from the law of the forum state, we look to see (1) whether the absent provision is among the "universally familiar" aspects of litigation; and (2) whether the provision is "indispensable to any scheme of justice." *Felder v. Casey*, 487 U.S. 131, 140 (1988).

On the first prong of the *Felder* analysis, the district court found that blanket rules of repose, as opposed to statutes of limitations, are rare in federal statutory schemes. We agree. Liberty National has not shown that blanket rules of repose form a regular feature of the prosecution of federal causes of action.[1] The absence of absolute rules of repose through most

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1. The only case Liberty National cites for the proposition that rules of repose are an integral feature of federal litigation is *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). In that case, the Court applied a blanket repose rule that was provided for in the text of 15 U.S.C. § 78r(c), a federal securities statute. *Id.* at 360-62. Liberty National has not contended that rules of repose are present in other federal statutory schemes and cannot demonstrate that they are a regular, much less a "universally familiar," element of federal litigation.

of the federal legal landscape makes it difficult to contend that statutes or rules of repose are "universally familiar" in federal litigation.

The fact that rules of repose rarely appear in federal law also cuts against any notion that a blanket rule of repose is "indispensable to any scheme of justice." Liberty National has not directed us to a single case in which a blanket state rule of repose was applied by a federal court to bar a federal civil rights claim, and we are not aware of any such case. The Reconstruction-era Civil Rights Acts have long been implemented by federal courts without applying any blanket rule of repose. Liberty National's contention that blanket rules of repose are "indispensable to any scheme of justice" would suggest that all prior federal decisions applying the Reconstruction-era Civil Rights Acts are contrary to the principles of justice. We are not prepared to accept such a sweeping (and unsupportable) contention.

Alabama's rule of repose is analogous to the state "notice of claim" statute at issue in *Felder*. Wisconsin maintained a statute that required plaintiffs seeking to sue a state entity to notify the defendant(s) of an intent to sue within 120 days of the injury, at which time the defendant(s) has 120 days to grant or deny the requested relief. *Felder*, 487 U.S. at 136-37. If relief is denied, the plaintiff then has six months to bring suit in state court. *Id.* at 137. The plaintiff in *Felder* brought a 42 U.S.C. § 1983 action against the City of Milwaukee and several police officers nine months after the incident giving rise to the claim occurred.[2] *Id.* at 135.

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2. The plaintiff alleged that he was beaten savagely in the course of being arrested for disorderly conduct. *Id.* at 135.

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The Wisconsin Supreme Court rejected the plaintiff's claim for failure to comply with the 120-day time limit established by the notice of claim statute. *Id.* at 137. The United States Supreme Court reversed, holding that notice of claim statutes were neither "universally familiar" to federal causes of action nor in any sense indispensable prerequisites to litigation. *Id.* at 140. As such, there was no reason to suppose that Congress intended this sort of state rule to be borrowed and applied to the federal civil rights statutes under § 1988. *Id.*

The analysis the Court employed in *Felder* is applicable to the instant case. Blanket rules of repose, much like notice of claim provisions, are not "universally familiar" to federal litigation; indeed, they rarely appear in federal law. Nor are rules of repose an indispensable prerequisite to litigation. Federal civil rights claims always have been litigated without the use of blanket rules or repose. Thus, there is no reason to believe that Congress intended for us to borrow such a rule under the terms of § 1988.

While the absence of a rule of repose is not a deficiency in the Reconstruction-era Civil Rights Acts that needs to be remedied through reference to state law, it is clear that the absence of a statute of limitations on the face of §§ 1981 and 1982 is such a deficiency. The Supreme Court has long recognized that statutes of limitations are an integral feature of any federal cause of action. *Wilson*, 471 U.S. at 271 ("Just determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost."); *Bd. of Regents of the Univ. of the State of N.Y. v. Tomanio*, 446 U.S. 478, 487 (1980) ("Statutes of limitations are not simply technicalities. On the contrary, they

have long been respected as fundamental to a well-ordered judicial system."); *Adams v. Woods*, 6 U.S. (2 Cranch) 336, 341 (1805) (Actions "brought at any distance of time" would be "utterly repugnant to the genius of our laws."). The absence of a statute of limitations in the language of §§ 1981 and 1982 is a deficiency in those statutes that must be filled through reference to appropriate state law. Neither Liberty National nor plaintiffs dispute that a state statute of limitations must be borrowed if §§ 1981 and 1982 are to be implemented. Liberty National, however, contends that Alabama's rule of repose is integral to its statutes of limitations and cannot be excluded when those statutes are applied.

To evaluate this argument, we must turn to the second prong of the § 1988(a) analysis, which involves the identification and application of an appropriate state rule to fill a recognized gap in the federal cause of action. Historically, in the statutes of limitations context, courts have struggled with this process. Most states have a plethora of statutes of limitations that apply to distinct causes of action in state law. In the past, federal courts attempting to apply the appropriate state limitations period to a federal civil rights claim had to analogize the factual allegations of the claim to a particular state cause of action — often a conceptually difficult and imperfect task. *See, e.g., Owens v. Okure*, 488 U.S. 235, 249 (1989). As a result, the Supreme Court established clear guidelines to govern the borrowing process. *Id.* at 250. To ensure some level of uniformity, the Court held that a state's general or residual statute of limitations for personal injury torts should be borrowed for application to federal civil rights claims arising under the Reconstruction-era Civil Rights Acts. *Id.* at 250-51 (mandating the use of a

state's residual personal injury statute of limitations for § 1983 claims); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987) (mandating the use of a state's residual personal injury statute of limitations for §§ 1981 and 1982 actions). This rule ensures that when a state has multiple limitations provisions, only one particular limitations rule is borrowed to fill the gap in the civil rights statutes.

Furthermore, when borrowing the residual personal injury statute of limitations from a state, federal courts borrow no more from state law than is necessary to effect that limitations period. *West v. Conrail*, 481 U.S. 35, 39-40 (1987); *Wilson*, 471 U.S. at 269 ("Only the length of the limitations period, and the closely related questions of tolling and application, are to be governed by state law."). Therefore, when applying a state's residual personal injury statute to fill the gap in §§ 1981 and 1982 claims, we borrow nothing from state law other than the terms of the statute itself and closely related state law principles intrinsic to its appropriate application, such as tolling doctrines.

Liberty National's contention that § 1988(a) mandates applying Alabama's repose doctrine to plaintiffs' §§ 1981 and 1982 claims is questionable in light of these well-established principles. We borrow as little as is necessary from state law in applying a state's statute of limitations pursuant to § 1988; in fact, we borrow only the length of the state's residual personal injury statute of limitations and any closely related state law principles necessary to effect that statute. Application of an additional, distinct state limitations period, such as a rule of repose, would contradict our mandate to borrow and apply only one specific limitations period to §§ 1981 and 1982 claims.

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Liberty National argues that Alabama's repose doctrine is an integral part of the state's set of statutes of limitations and must be applied in tandem with those statutes if they are to be given their intended effect. In an effort to support this argument, Liberty National contends that the rule of repose is "part" of a unified, indivisible scheme involving limitations on actions and that the two doctrines cannot be divided for the purposes of application. Indeed, Liberty National argues that the rule of repose is one of the "closely related" state law doctrines intrinsic to the application of Alabama's statutes of limitations and therefore must be borrowed in the instant case.

Liberty National's arguments, however, often appear to conflate rules of repose and statutes of limitations and at points suggest that the two rules are indistinguishable legally.[3] This approach is unconvincing, as it is clear that the doctrines are distinct, both conceptually and legally. We identified this distinction before, when we noted,

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3. For example, Liberty National cites language from several Supreme Court cases in which the Court states that policies of "repose" are necessary components of all federal causes of action. *E.g.*, Brief of Pet'r at 18 (citing *Tomanio*, 446 U.S. at 488, which held that "state policies of repose cannot be said to be disfavored in federal law"). However, it is clear that the Court was referring to the policies of "repose" underlying state statutes of limitations and not the separate statutes or doctrines of repose that exist in Alabama and elsewhere. Reading the cited opinions in context, it is obvious that the Court was not conflating or confusing statutes of limitations and rules of repose, but rather using the word "repose" to refer to the policy interest underlying state statutes of limitations. The fact that the term "repose" may have been used to refer to statutes of limitations in several past Supreme Court opinions does not demonstrate that state statutes of limitations are linked inextricably to state rules of repose.

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> There is a distinct difference between statutes of limitations and statutes of repose. A statute of limitations normally governs the time within which legal proceedings must be commenced after the cause of action accrues . . . . *A statute of repose, however, limits the time within which an action may be brought and is not related to the accrual of any cause of action.*

Bradway v. Am. Nat'l Red Cross, 992 F.2d 298, 301 (11th Cir. 1993) (alteration in original) (internal quotation marks omitted).

One of our sister courts clarified the distinction further when it discussed the differing purposes of statutes of limitations and a statute codifying Maryland's rule of repose:

> A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time. Statutes of limitations are motivated by considerations of fairness to defendants and are intended to encourage prompt resolution of . . . claims. Statutes of repose are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck

> by determining a time limit beyond which liability no longer exists.

First United Methodist Church of Hyattsville v. United States Gypsum Co., 882 F.2d 862, 865-66 (4th Cir.1989) (citations omitted). Liberty National's effort to blur the distinctions between the two doctrines is unavailing in light of this well-established law. In order to prevail on its claim that Alabama's doctrine of repose must be borrowed if the state's statutes of limitations are to be implemented, Liberty National must demonstrate that the statute of limitations and the doctrine of repose, despite their distinctions, are interdependent.

This Liberty National cannot do, because the statutes of limitations and rules of repose apply in ways that are independent of one another. Proper application of a statute of limitations is dependent upon principles of accrual. The time period begins to run when the cause of action arises and not necessarily on the date of the relevant act or omission. *Michael v. Beasley*, 583 So. 2d 245, 252 (Ala.1991). A defining characteristic of the rule of repose is that its time period does not begin to run when the action accrues, but rather when the relevant action occurs. *Boshell*, 418 So. 2d at 91. Thus, the two doctrines are defined largely by reference to inconsistent rules of application; one takes accrual principles into account before its time period begins to run, while the other does not. The rule of repose and the statute of limitations do not affect each other directly, as they are triggered by entirely distinct events. Therefore, it is impossible to assert credibly that the doctrines depend upon

each other or that application of the one necessarily involves application of the other. In fact, a statute of limitations can be and is applied in exactly the same manner regardless of the outcome of the distinct, separate application of the rule of repose.

Of course, Alabama's rule of repose may serve to bar actions that would have been permitted under Alabama's relevant statute of limitations. Obviously, the reverse also is true; actions permissible under the rule of repose may be barred by the shorter statute of limitations. However, none of this means that the two doctrines are somehow linked or interdependent. Alabama maintains several distinct doctrines that provide for time limits on causes of action, among them a rule of repose and a set of statutes of limitations, and each of these doctrines have their own unique rules of application.

This principle — the distinctiveness of the rule of repose and its independence from statutes of limitations — has been noted in Alabama case law. Alabama authorities distinctly distinguish between statutes of limitations and the repose doctrine and emphasize the independence of the rule of repose. *Grubbs*, 542 So. 2d at 930 ("[Repose] is similar to, but broader than, a statute of limitations, *and is not affected by it, nor dependent upon it.*" (emphasis added) (citations omitted)); *Boshell*, 418 So. 2d at 91 ("This principle of repose or prescription is similar to a statute of limitations, but not dependent upon one, and broader in scope."). There is nothing

in Alabama's case law that suggests that its statutes of limitations and rules of repose are interdependent in any way.[4]

In sum, the absence of a blanket rule of repose in the text of the Reconstruction-era Civil Rights Acts is not a gap in federal law that must be filled to implement the Acts. Such rules are rare in federal law, and they are not a necessary prerequisite to litigation in an ordered system of justice. In contrast, the absence of a statute of limitations in §§ 1981 and 1982 is a deficiency that must be remedied by reference to state law. In borrowing a state statute of limitations, however, federal courts select only one of the state's limitations periods (namely, the residual state statute of limitations for personal injury torts) and borrow no more from state law than is necessary to implement that limitations period. The length of Alabama's two-year statute of

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4. Liberty National's reliance on the ancient case of *Balkam v. Woodstock Iron Co.*, 154 U.S. 177 (1894), for the proposition that Alabama's rule of repose and its statutes of limitations are linked inextricably is misplaced. In that case, the Supreme Court declined to disturb an Alabama judgment that applied the rule of repose to bar a claim. *Id.* at 189. The Court noted that state courts were the ultimate authority on questions pertaining to the application of state statutes of limitations; by analogy, the Court held that Alabama courts had the final word on the doctrine of repose. *Id.* (In deciding questions pertaining to the doctrine of repose, the Alabama Supreme Court "passed upon its own statutes of limitations, or the doctrines of prescription as applied by it, and we are obliged to apply and enforce their conclusions."). The case does not hold, as Liberty National suggests, that the rule of repose is a part of Alabama's statutes of limitations.

limitations for personal injury torts, along with closely related state law questions of tolling and application, are all courts need borrow to implement §§ 1981 and 1982 properly. Courts should not borrow Alabama's entirely distinct repose doctrine, as it is not necessary to apply this doctrine to effect the applicable state statute of limitations.

B.

Liberty National raises two additional questions outside the scope of the issue the district court certified for interlocutory appeal. First, Liberty National contends that Alabama's two-year statute of limitations for personal injury bars plaintiffs' claims. Second, it contends that section 27-12-11(a) of the Alabama Code, which prohibits discrimination in life insurance rates between individuals of the same life expectancy, reverse-preempts §§ 1981 and 1982 under the terms of the McCarran-Ferguson Act, codified at 15 U.S.C. § 1012.

Under 28 U.S.C. § 1292(b), we retain the discretion to decline to address any issues not certified for interlocutory appeal by the district court. *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1275 n.4 (11th Cir.1999). However, the district court's order, not the certified question, is brought before the court on a § 1292(b) appeal, and this court's jurisdiction is not confined to the precise question certified by the district court. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 204-05 (1996).

In the instant case, we decline to consider Liberty National's contention that Alabama's relevant statute of limitations bars plaintiffs' claims. We conclude that the facts

necessary to address many of Liberty National's claims with respect to this issue have not been developed adequately at this stage of the proceedings.

Liberty National's contention that §§ 1981 and 1982 are reverse-preempted by Alabama's scheme of insurance regulation is not dependent upon unresolved factual issues. It therefore is appropriate for resolution at this stage of the proceedings. We thus turn to the question of whether the McCarran-Ferguson Act precludes the application of §§ 1981 and 1982 in the Alabama insurance context.

C.

The question of whether the McCarran-Ferguson Act mandates preemption of the §§ 1981 and 1982 claims presents a legal issue of statutory interpretation, which we review de novo. *Blackfeet Nat'l Bank v. Nelson*, 171 F.3d 1237, 1240 (11th Cir.), *cert. denied*, 528 U.S. 1004 (1999).

The McCarran-Ferguson Act states that "[n]o act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b). The Act thus bars the application of federal law if (1) the federal statute at issue does not " 'specifically relat[e] to the business of insurance' "; (2) the state statute at issue was " 'enacted . . . for the purpose of regulating the business of insurance' "; and (3) application of the federal statute would " 'invalidate, impair, or supersede' " the state statute. *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999) (alterations in original) (quoting 15 U.S.C. § 1012(b)).

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There is no question that §§ 1981 and 1982, by their terms, do not relate specifically to the business of insurance, so the first prong of the *Humana* analysis is satisfied. It also is clear that the state statute that Liberty National has put at issue was enacted for the purpose of regulating the business of insurance. The statute, codified at section 27-12-11 of the Alabama Code, provides as follows:

> (a) No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity, or in the dividends or other benefits payable thereon or in any other of the terms and conditions of such contract.

Ala. Code § 27-12-11. Therefore, our task is limited to determining whether §§ 1981 and 1982 "invalidate, impair, or supersede" the terms of the statute above.

Liberty National contends that §§ 1981 and 1982, when applied to the life insurance context, thwart Alabama's carefully crafted scheme of insurance regulation. Liberty National asserts that Alabama bans unfair discrimination among individuals of the same life expectancy, but explicitly permits all other forms of discrimination in the provision of insurance. Therefore, Liberty National argues that racial discrimination is acceptable in the Alabama life insurance context so long as those racial distinctions have an actuarial basis, *i.e.* they are not used to discriminate among individuals with the same expectation of life.

Plaintiffs respond with two distinct arguments in support of their contention that the McCarran-Ferguson Act does not mandate preempting their civil rights claims. Plaintiffs first contend that the Reconstruction-era Civil Rights Acts are not subject to the reverse-preemption provision of the McCarran-Ferguson Act, as the McCarran-Ferguson Act was intended to apply solely to federal statutes passed pursuant to the Constitution's Commerce Clause, not to legislation rooted in Congress's power to enforce the Thirteenth and Fourteenth Amendments, such as the Civil Rights Acts. *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054, 1066 (2d Cir.1982), (holding that the McCarran-Ferguson Act had no application to civil rights statutes, labor laws, and other areas of "national concern"), *vacated*, 463 U.S. 1223 (1983), *reinstated as modified*, 735 F.2d 23 (2d Cir.1984). Alternatively, plaintiffs contend that §§ 1981 and 1982 do not "invalidate, impair, or supersede" section 27-12-11 of the Alabama Code and therefore are not reverse-preempted by the McCarran-Ferguson Act.

We decline to address the first of plaintiffs' contentions, as a decision on the applicability of the McCarran-Ferguson Act to the Reconstruction-era Civil Rights Acts is unnecessary for a resolution of this appeal. We agree with the district court that §§ 1981 and 1982 do not "invalidate, impair, or supersede" Alabama's scheme of insurance regulation and therefore are not subject to the reverse-preemption provisions of the McCarran-Ferguson Act.

In *Humana*, the Supreme Court reiterated definitions it employed in earlier cases with respect to the terms "invalidate" and "supersede." 525 U.S. at 307. Invalidate

"means to render ineffective, generally without providing a replacement rule or law," while supersede generally "means to displace (and thus render ineffective) while providing a substitute rule." *Id.* (internal quotation marks omitted). The term "impair" has a more complex meaning; the Court defined that term as follows:

> When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.

Id. at 310.

The language of §§ 1981 and 1982 does not "invalidate" or "supersede" the terms of the relevant Alabama statute. Sections 1981 and 1982 prohibit racial discrimination in the making of contracts and the acquisition and disposal of real and personal property; Alabama's insurance statute prohibits "unfair discrimination" in the pricing of life insurance rates (or the payment of dividends) for persons with the same life expectancy. The federal rule does not contradict directly the terms of the state statute or render it impossible to effect or implement that statute. The rules proscribe different, though possibly overlapping, conduct and do not conflict directly. They certainly cannot be construed as operating to invalidate or supersede one another.

Therefore, the only real question in this matter is whether the Reconstruction-era Civil Rights Acts "impair" section 27-11-12 of the Alabama Code, *i.e.* whether the

Reconstruction-era Civil Rights Acts frustrate any declared state policy or interfere with the state's administrative regime in the insurance context.

Liberty National has not demonstrated that §§ 1981 and 1982, applied to insurance contracts, frustrate any declared state policy, because they have not demonstrated that it is in fact the policy of Alabama to encourage or condone racial distinctions in the provision of life insurance. We have not been directed to any relevant Alabama authority that has required, condoned, or suggested that racial distinctions in the provision of life insurance are acceptable. Indeed, there is nothing in Alabama's insurance law that directs or encourages insurers to engage in such practices. *See NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287, 297 (7th Cir. 1992) (finding that Fair Housing Act provisions banning discriminatory "redlining" in setting insurance rates are not reverse-preempted by the McCarran-Ferguson Act because there was no state decision, regulation, or statute "requiring redlining, condoning that practice, . . . or holding that redlining . . . does not violate state law"). The Seventh Circuit made note of the fact that the State did not intervene in the *American Family* case to argue that the federal law at issue would frustrate its scheme of insurance regulation. The State of Alabama likewise does not intervene in this case.

Liberty National asks us to make a substantial interpretive leap in our construction of Alabama's life insurance regulations. We are asked to assume that the abolition of one form of discrimination, as codified in section 27-11-12, amounts to a clear declaration by the state that all other forms of discrimination, however invidious, are

acceptable. We cannot construe Alabama's scheme of insurance regulation in such a formalistic and narrow way. Absent more convincing evidence that racial discrimination in the insurance context is an integral part of Alabama's regulatory scheme, Liberty National's argument must fail.

Pertinent guidance in analyzing this issue comes from the Supreme Court decision in *SEC v. National Securities, Inc.*, 393 U.S. 453 (1969). In that case, the Court upheld the SEC's authority (against a McCarran-Ferguson Act challenge) to block an insurance company merger approved by the Arizona regulatory authorities. The Court found that "Arizona ha[d] not commanded something [that] the Federal Government [sought] to prohibit. It ha[d] permitted respondents to consummate the merger; it did not order them to do so." *Id.* at 463. The Court concluded that "[t]he paramount federal interest in protecting shareholders is . . . perfectly compatible with the paramount state interest in protecting policyholders." *Id.*

The analysis that the Court employed in *National Securities* is applicable to the instant case. In *National Securities*, the Court faced a situation in which the conflict between federal and state interests was much more pointed than the conflict in the instant case. The state determined that the merger was acceptable under the state's insurance guidelines; the federal government blocked that same merger on other grounds. Rather than rely upon the conflicting actions of the two entities, the Court analyzed what, in fact, Arizona had done by permitting the merger to go forward. The Court correctly noted that Arizona's action was not an unambiguous command that the merger go forward; rather,

it was simply a grant of permission for the companies involved to do so. It was precisely because Arizona's actions did not amount to a clear command to consummate the merger that the federal actions preventing that merger were not construed as inconsistent with Arizona's regulatory scheme.

In the instant case, we likewise cannot conclude that Alabama intended to condone racial discrimination in its scheme of insurance regulation. We therefore see no inconsistency between the state's interest in preventing "unfair discrimination" between individuals with similar life expectancies and the paramount national interest in preventing racial discrimination in the contexts articulated by §§ 1981 and 1982. The two nondiscrimination principles complement each other, and Liberty National has not demonstrated that the federal statutes at issue impinge on any declared state policy in the insurance context. Therefore, the McCarran-Ferguson Act does not require the reverse-preemption of plaintiffs' §§ 1981 and 1982 claims.

Appendix A

CONCLUSION

In conclusion, we hold that the district court did not err when it declined to apply Alabama's common law doctrine of repose to block plaintiffs' federal civil rights claims. We further hold that §§ 1981 and 1982 are not reverse-preempted by section 27-12-11 of the Alabama Code. The Reconstruction-era Civil Rights Acts complement, rather than conflict with, Alabama's regulatory scheme in the insurance context, and, therefore, the McCarran-Ferguson Act has no application to the instant case. We decline to address Liberty National's claim that the applicable statute of limitations bars plaintiffs' claims.

The order of the district court is

AFFIRMED.

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, SOUTHERN DIVISION DATED, FILED, AND ENTERED JULY 3, 2000

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CV-99-BU-3262-S

ELLEN GAYLE MOORE, FANNIE McCONNELL, SPENCER WILLIAMS, and ANITA BOWERS, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

LIBERTY NATIONAL INSURANCE COMPANY,

Defendant.

MEMORANDUM OPINION

Now pending is a motion to alter or amend the judgment of the Court and for leave to file an amended complaint filed by Ellen Gayle Moore ("Moore"), Fannie McConnell ("McConnell"), Spencer Williams ("Williams"), and Anita Bowers ("Bowers") on April 24, 2000. In that motion, the Plaintiffs seek to have this Court (1) permit them to amend their complaint in order that they may surmount any challenge by Liberty National Insurance Company ("Liberty National") to their claims grounded in the statute of limitations and

(2) reinstate their action by amending its earlier order dismissing their section 1981 claims as time-barred and dismissing their remaining state law claims for lack of original jurisdiction. Liberty National responds that this Court should disallow the Plaintiffs an amended complaint and that it should not depart from its earlier order dismissing the action.

Background

Moore, McConnell, Williams and Bowers filed their initial complaint on, 1999, alleging a systematic, institutional practice of race discrimination in the provision of industrial life insurance to African-Americans, lasting from the early 1940's into the present. This ongoing practice, attributed to Liberty National and its predecessor, subsidiary, or acquired companies, formed the foundation of the Plaintiffs' complaint, supporting claims under the section 1 of the Civil Rights Act of 1866 prohibiting discrimination in contractual relations, most recently amended by the Civil Rights Act of 1991, and codified at 42 U.S.C. § 1981, and a host of state law claims, brought only on the named Plaintiffs' behalf, but on behalf of a nationwide class of African-American purchasers of Liberty National's industrial insurance products. Liberty national responded to the complaint by filing a motion for more definite statement on January 3, 2000; the motion was denied by the Court on the following day. On the 14th of January, 2000, the earlier motion of Liberty national was succeeded by a motion to dismiss the Plaintiffs' complaint. The Court denied the second-pre-answer motion, stating that the matters raised in it should have accompanied the earlier motion for more definite

statement. An answer was filed by Liberty National on January 27, 2000, contemporaneous with a motion for judgment on the pleadings that reiterated the grounds for dismissal contained in the motion to dismiss. The motion was granted by the Court, which determined that the Plaintiffs had failed to overcome a timeliness bar posed by Alabama's two year statute of limitations to their federal section 1981 claims. The section 1981 claims were dismissed, with prejudice, and the state-law claims were dismissed, without prejudice for the Plaintiffs to proceed in state court.

Hoping to revive their case in federal court, the Plaintiffs moved for reconsideration of the motion for judgment on the pleadings and for the opportunity to file an amended complaint. The amended complaint that the Plaintiffs propose to file in place of the original complaint purports to repair the pleading deficiencies that caused the Court to earlier dismiss the action, first, by adding allegations tending to demonstrate that the Plaintiffs had no knowledge of the racially discriminatory practices of Liberty National until shortly prior to the filing of this action and second, by adding to their complaint another theory of recovery under the provisions against discrimination in the maintenance of property under section 1 of the Civil Rights Act of 1866, as codified at 42 U.S.C. § 1982.

In response to letters requesting oral argument, the Court held a hearing on June 20, 2000, to hear argument on the matters raised by the parties. That argument was informative, clarifying many questions of concern to the Court.

Much of the proposed amended complaint is unchanged from the original complaint; factual allegations, both broad

and particular, remain as they were in the prior complaint. This being so, the Court need not recount many of those allegations in detail here, as they are canvassed in its earlier order dismissing this action. Rather, the Court confines its account of the allegations expressed in the proposed amended complaint to the general claims and their history.

As a putative class action, this case is brought by Moore, McConnell, Williams, and Bowers on behalf of all African-Americans who purchased industrial life insurance policies from Liberty National or any of its predecessor, subsidiary or acquired companies.[1] According to the Plaintiffs, for nearly sixty years, Liberty National sold to African-Americans, including themselves, industrial life insurance in which the proportion of premiums to cash value and benefits was greater than the proportion for similarly situated white individuals — that is, the premiums on each industrial life insurance policy sold to an African-American were realized in a lower cash value or benefit amount than would have been the case were the same premiums paid by a white individual. The sale of these allegedly discriminatory premiums was

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1. The term "industrial life insurance" is commonly applied to small insurance policies purchased mainly by working-class individuals so that upon their deaths a funeral can be afforded by their relatives. "Industrial Life Insurance is a life insurance product with relatively low face value which is typically, although not always, less than $ 20,000, and premium payments which are intentionally designed to appear to the policy holder to be modest premiums." Plaintiffs' First Amended Class Action Complaint at ¶ 9. As employed by the Plaintiffs, the term "industrial life insurance" has a broader reach than it does in common usage, covering, in addition to burial insurance, any life insurance and health and accident insurance, the value of which was calculated, at least in part, on the basis of race.

accomplished through the use of debit routes, territories assigned to agents of Liberty National who would collect premiums and encourage the purchase of more discriminatorily-priced insurance products.

Central to the Plaintiffs' motion for reconsideration is an account contained in the proposed amended complaint attempting to explain why the Plaintiffs, and allegedly all purported class members, were unaware of the Defendant's purportedly discriminatory rate setting policies. The Plaintiffs assert that, while the Defendant calculated policy rates based upon whether a purchaser of insurance was African-American or white, it would intentionally disguise the basis of its rate-setting through the use of neutral-seeming descriptions of those rates: Liberty national employed the term "standard rates" to refer to insurance rates applicable to African-Americans and the term "premium rates" to refer to insurance rates available only to white individuals. Thus, an African-American, when sold an insurance policy, would be told that the proportion of premiums to benefits in the policy was determined according to the "standard" rate, rather than that her insurance rates were tied to her race. In addition, Liberty National allegedly encouraged its agents to sell discriminatory policies to African-Americans, first, by instructing those agents not to reveal to African-American customers that they were charged higher rates than whites and second, by tying commissions to the type and amount of insurance sold. Because a revelation that rates varied on the basis of race would decrease an agent's African-American customers, Plaintiffs allege, each agent had a disincentive to reveal that the pricing of the policies was discriminatory. Finally, the Plaintiffs aver that Liberty National, after ceasing

to make explicit, race-based distinctions among individuals in setting policy rates, nonetheless continued to sell racially-discriminatory policies by including in the calculation of policy rates factors often directly correlated with race, such as employment in certain occupations or residence in "undesirable" neighborhoods. Plaintiffs claim that they did not learn of these practices of Liberty National until shortly before the filing of this action and, in any case, less than two years before the action was filed, though they do not specify a particular date on which each named Plaintiff discovered the allegedly discriminatory manner in which insurance rates were set.

Contentions & Analysis

Liberty National first contends that the Court should not permit the proposed amendment to the Plaintiffs' complaint because, even if amendment is permitted, the claims contained in the amended complaint would still run afoul of the statute of limitations. Regarding its argument that the statute of limitations would act as a bar, even to the proposed amended complaint, Liberty National contends, one, that nothing in the proposed amended complaint changes the date on which the Plaintiffs' section 1981 claims accrued and that the addition of the section 1982 claims to their case does not fix the Plaintiffs' timeliness problem because the Plaintiffs' claims under section 1982 accrued at the same time as the section 1981 claims. Next, Liberty National contends, nothing in the proposed amended complaint requires the Court to revisit its determination that the Plaintiffs' federal law claims arise from a continuing violation allowing them to avoid the statute of limitations bar. Liberty National argues,

three, that because, in their proposed amended complaint, the Plaintiffs fail to adequately plead fraudulent concealment in compliance with Federal Rule of Civil Procedure 9(b), the Plaintiffs are not entitled to argue that their claims were tolled until recently discovered.

The remaining arguments against amendment are drawn from Liberty National's motion for judgment on the pleadings, incorporated by reference into Liberty National's opposition to the Plaintiffs' motion for reconsideration. Only four of the arguments in that motion have particular relevance to the issue of whether amendment would be futile, defeating reinstatement of the Plaintiffs' case. The remainder of Liberty National's arguments are not directed at eradicating all of the Plaintiffs' claims, only parts thereof, and, as such, have no direct bearing on the propriety of amendment and reinstatement of the Plaintiffs' case. In the briefs filed in support of its motion for judgment on the pleadings, Liberty National argues that the Plaintiffs' claims, first, are barred under the Alabama common law rule of repose and, second, are barred by the equitable doctrine of laches. Third, Liberty National asserts that the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), which limits the application of federal law to certain state regulations of insurance, prohibits the Plaintiffs' section 1981 and 1982 claims. In its fourth argument against permitting amendment drawn from the motion to dismiss, Liberty National argues that this Court should abstain from deciding this case under the *Burford* abstention doctrine.

While the remaining arguments of Liberty National do not bear on the propriety of amendment, they are determinative of what claims remain in this action. These arguments are, first,

that all claims of the Plaintiffs related to the concealment of the cash value of policies of insurance should be dismissed; second, that all claims based upon the discontinuance of the debit route system are due to be dismissed; third, that all claims involving burial insurance are barred by *res judicata* and release; fourth, that all claims involving cancer insurance are barred by *res judicata* and release; fifth, that the Plaintiffs' state law claim for money had and received is non-cognizable and runs afoul of the statute of limitations; sixth, that Plaintiffs' are incapable of stating a basis for declaratory or injunctive relief; seventh, that the Plaintiffs' claims for unjust enrichment are barred by the existence of contracts between them and Liberty National; eighth, that the Plaintiffs' tort claims of negligent hiring, supervision and retention by Liberty National of its agents and employees are not maintainable and barred by the statute of limitations; ninth, that the Plaintiffs' claims of breach of contract fail as a matter of law; and tenth, that the Plaintiffs' claims of breach of fiduciary duty are barred by the statute of limitations.

The argument on the motion for reconsideration has focused on the viability of the federal claims, both on paper and in the June 20, 2000, hearing. Further, arguments against maintenance of the state-law claims need not be addressed unless the Plaintiffs are entitled to proceed on their proposed amended complaint. It is, therefore, to Liberty National's arguments for disallowing amendment of the complaint that the Court first turns.

Appendix B

WHETHER THE PLAINTIFFS CAN AMEND THEIR COMPLAINT.

In *Bank v. Pitt*, 928 F.2d 1108, 1111 (11th Cir. 1991), the Eleventh Circuit Court of Appeals stated that, in response to a motion to dismiss or for judgment on the pleadings under Federal Rule of Civil Procedure 12, "[w]here it appears a more carefully drafted complaint might state a claim upon which relief can be granted, we have held that a district court should give a plaintiff an opportunity to amend his complaint instead of dismissing it." *See* also *Allison v. McGhan Medical Corp.*, 184 F.3d 1300, 1308 (11th Cir. 1999). Unless a substantial reason exists to deny such a motion to amend, it should be freely granted. *See Thomas v. Town of Davie*, 847 F.2d 771, 773 (11th Cir. 1988). This is true not only when a plaintiff requests leave to amend her complaint in the face of a motion to dismiss, but also when a plaintiff moves the court for reconsideration of an earlier dismissal and the opportunity to amend her complaint in the wake of dismissal. *Id.*[2]

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2. Liberty National, in its oral argument, appeared to relinquish any contention that the Plaintiffs should be given the opportunity to amend their complaint if such amendment would not be futile. To the extent that Liberty National seeks to have this Court deny the Plaintiffs the opportunity to amend on the grounds that in amending, the Plaintiffs should not be permitted to raise new argument or present new theories of recovery, its argument is not well taken. Restricting reconsideration and amendment solely to those cases in which the arguments and theories contained in the original complaint are adequate to support a claim runs counter to the permissiveness with which this Court is to allow amendment in the face of dismissal. This memorandum opinion instead focuses only on the arguments given by Liberty National that permitting amendment in the instant case would be "futile."

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Though the court is to take a permissive approach to granting amendment of a complaint in lieu of dismissal, its liberality is to be tempered by attentiveness to the presence of "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment . . . ." *Forman v. Davis*, 371 U.S. 178, 182 (1962). *See McKinley v. Kaplan*, 177 F.3d 1253, 1258 (11th Cir. 1999). Liberty National asserts that, even were the Court to permit the Plaintiffs to file the proposed amended complaint attached to their motion, that amendment would be futile, as sufficient reasons remain for dismissal of the complaint. " 'A proposed amendment is futile if the complaint, as amended, would be subject to dismissal.' " *Galindo v. ARI Mut. Ins. Co.*, 203 F.3d 771, 777 n.10 (11th Cir. 2000) (quoting *Jefferson County School Dist. No. R-1 v. Moody's Investor's Servs., Inc.*, 175 F.3d 848, 859 (10th Cir. 1999)). Therefore, as a matter preliminary to permitting amendment, the Court must examine the proposed amended complaint to determine whether, in spite of its revised allegations, it collapses under the weight of the same deficiencies extant in its predecessor.

As earlier noted, Liberty National offers five arguments in support of its position that any amendment of the complaint would be futile: that under the amended complaint (1) the federal (and state) claims would be barred by the statute of limitations; (2) the claims would be barred by the doctrine of repose; (3) the claims would be barred by the doctrine of laches; (4) the McCarren-Ferguson Act prohibits the section 1981 and 1982 claims of the Plaintiffs; and

(5) *Burford* abstention bars this Court from considering the Plaintiffs' claims.

A. Statute of limitations.

Liberty National contends that even under the amended complaint, the statute of limitations continues to bar the Plaintiffs' claims. This is so, it argues, because each Plaintiff's claims accrued on the date that a policy was obtained by him or her and the claims are not subject to equitable tolling principles. The Plaintiffs counter that the actions of Liberty National upon which each of their claims under sections 1981 and 1982 are premised constitute a continuing violation of those statutes and as such, each of their claims continued to accrue each day from the date of the purchase of each policy up to the present. In addition, the Plaintiffs argue that even if their claims do not arise from continuing violations of sections 1981 and 1982 by Liberty National and each claim accrued at the time of the purchase of each policy, because of the fraudulent concealment of their claims by Liberty National, all of their claims were equitably tolled until their recent discovery.

While it may be the case that a federal claims accrual rule would provide a basis for concluding that the Plaintiffs' federal claims did not accrue until their actual discovery, the Court need not and does not alter its conclusion that each of the Plaintiffs' claims came into existence at the moment when each policy of insurance was purchased in the fifties, sixties and seventies nor address for a second time the Plaintiffs' arguments attempting to convince this Court to revisit its

conclusions concerning continuing violations.[3] This is so because the proposed amended complaint contains allegations supporting the existence of fraudulent concealment by Liberty National of the Plaintiffs' claims, equitably tolling the statute of limitations under § 6-2-3 of the Alabama Code of 1975.[4]

Section 6-2-3 of the Alabama Code of 1975 allows a plaintiff alleging that his claims have been fraudulently concealed from him to toll the running of the statute of limitations; "the claim must not be considered as having accrued until the discovery by the aggrieved party of the fact constituting the fraud, after which he must have two years within which to prosecute his action." As such, the statute of limitations does not begin to run until the plaintiff, utilizing ordinary care, should have discovered the fraudulent concealment. *Lott v. Tarver*, 741 So. 2d 394, 397 (Ala. 1999). To have the benefit of section 6-2-3, however, the plaintiff must plead with particularity the fraudulent concealment and must state the time period within which he discovered the concealment of his claim.

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3. Even were the Court to accept the Plaintiffs' argument regarding the accrual rule, the original complaint did not plead facts that would have permitted the inference that the federal claims accrued within the limitations period.

4. Equitable tolling principles to be applied in determining whether the statute of limitations has run are those provided under relevant state law, as modified by countervailing policies of federal law. *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. 454, 464-65 (1975).

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Federal Rule of Civil Procedure 9(b) requires allegations of fraud to be stated "with particularity." This requirement applies not only to claims of fraud, but also to allegations of fraudulent concealment of claims. *Summer v. Land & Leisure, Inc.*, 664 F.2d 965, 970 (5th Cir. Unit B 1981). In its earlier opinion, the Court quoted the opinion of the Eleventh Circuit Court of Appeals in *Brooks v. Blue Cross and Blue Shield of Florida, Inc.*, 116 F.3d 1364, (11th Cir. 1997), as explicating the pleading requirements contained in Rule 9(b). In that case, the Court of Appeals stated that a complaint satisfying the requirements of Rule 9(b) must plead four things: (1) the precise statements or omissions made by the defendant, (2) the time and place of each such statement and the person responsible for the statement, (3) the content of the statements and the manner in which they misled the plaintiff, and (4) what the defendant obtained as a result of the fraud. *Id.* In determining whether a complaint satisfactorily alleges each of these four items, a district court must attend to Rule 8(a) prescription that the plaintiff need only plead a short, plain statement of the grounds on which he is entitled to relief. *Id.*

The Plaintiffs' proposed amended complaint adequately meets all four of the Rule 9(b) factors required in this Circuit. The proposed complaint describes specifically the manner used to conceal the sale of industrial insurance polices at different rates to African-Americans than to whites under the rubric of "standard" and "premium" rates. The time period in which the statements are made is also demonstrable from the complaint as the time at which the insurance polices were purchased. Liberty National is explicitly credited with authoring the misleading language used to characterize its allegedly race-biased rates. The Plaintiffs make clear that

the labeling of the rates paid by them as "standard" rates rather than "African-American" rates effectively disguised from them the racially discriminatory natur of those rates. Finally, the Plaintiffs have clearly ind cated that the Defendant avoided litigation of the kind p esently filed with this Court by describing the insurance rates to be received by African-Americans as "standard." In addition, the Plaintiffs have alleged a relevant time frame for the discovery of the fraudulent concealment that brings them over the hurdle interposed by the statute of limitations.[5]

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5. While it would have been useful for each of the Plaintiffs to state a particular date on which he or she discovered the existence of his or her claims, the allegation in the complaint that the fraudulent concealment was discovered on a date nearly incumbent with the filing of the action is sufficient to comply with the pleading requirements of Federal Rules of Civil Procedure 8 & 9.

Further, the Court finds that the tolling principles alleged regarding their federal and state discrimination-type claims are inapplicable to the breach of contract claim arising from Liberty National's cessation of its weekly debit collection system. The cessation of this system would clearly be known to the Plaintiffs when it was ended. While there is no allegation as to when this system was dismantled by Liberty National, Liberty National's counsel admitted in the June 20, 2000 hearing that the debit route collection system was dismantled in 1995 or 1996. As such, the Plaintiffs will be ORDERED to amend their complaint to set forth such claim again, stating the date on which the debit collection system was dismantled, alleging such claim to escape bar by the statute of limitations. Otherwise, such claim will be DISMISSED, with prejudice.

Appendix B

B. Rule of repose.

Under Alabama law, the rule of repose is a judicially-created doctrine that provides the outer limits of time within which an action may be maintained, regardless of whether that action is barred by the statute of limitations. *See Barrett v. Wedgeworth*, 518 So. 2d 1256, 1257 (Ala. 1987).[6] In this sense, Alabama's rule of repose is of a different kind than its various statutes of limitations: While a statute of limitations is a procedural device that sets forth the time period within which an action is deemed to have accrued and that is capable of being waived or tolled, a rule of repose is substantive doctrine of the State, eliminating a cause of action, irrespective of its date of accrual. *See May v. Illinois Nat. Ins. Co.*, 190 F.3d 1200, 1206 (11th Cir. 1999); *Kaplan v. Shure Bros., Inc.*, 153 F.3d 413, 422 (7th Cir. 1998) and *Weeks v. Remington Arms Co., Inc.*, 733 F.2d 1485, 1487 n.2 (11th Cir. 1984). The rule's purpose "is to prevent inquiry into claims, such as this, where the evidence is obscured by the passage of time and the deaths of necessary witnesses." *Barrett*, 518 So. 2d at 1257. Application of the rule of repose has only one element — the passage of twenty years time from the moment that the actions giving rise to the claim

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6. The Court is aware of two senses of the term "rule of repose." The first is applicable to all statutes that work to time-bar an action, including statutes of limitations. Cf. *Board of Regents of University of State of N.Y. v. Tomanio*, 446 U.S. 478, 490 (1980). The second sense refers only to rules that cut off all claims accruing outside of a certain time period, regardless of whether a statute of limitations bar exists. It is this second sense of a rule of repose to which the discussion of the Court pertains.

occurred — and, if that time has elapsed, no claim can be pursued. See *Tierce v. Ellis*, 624 So. 2d 553, 554 (Ala. 1993). This rule clearly bars all of the Plaintiffs' state-law claims except the breach of contract claims based upon the termination of the debit routes, as the events giving rise to those claims occurred more than twenty years in the past.[7] Important for the revival of the Plaintiffs' section 1981 claims and the assertion of their section 1982 claims, however, is the issue of whether, like Alabama's statute of limitations, Alabama's judicially-created rule of repose is applicable to those federal claims.

The Court concludes that Alabama's common-law rule of repose is not applicable to the federal law claims of the Plaintiffs. *Johnson v. Railway Exp. Agency, Inc.*, 421 U.S. at 462, as later amended by *Wilson v. Garcia*, 471 U.S. 261 (1985), and *Owens v. Okure*, 488 U.S. 235 (1989), stated that the rule that the state statute of limitations for general or residual personal injury tort claims is applicable to claims brought pursuant to the federal civil rights acts, was grounded on the premise that section 1981 lacks a statute of limitations, an essential feature of any right of action, federal or state. By contrast, blanket repose rules barring all federal claims after a period of time has passed do not exist to bar federal actions; such rules appear sparingly among federal statutes. Failure to create a rule of repose concerning a particular statute is not an invitation to apply a state law rule of repose

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7. As such, those claims will be DISMISSED, with prejudice.

in its absence, as such rules do not form a regular feature of the landscape in the prosecution of federal rights.[8]

C. Doctrine of laches.

The defendant next asserts that the state-law doctrine of laches bars the Plaintiffs' federal and state law claims. Assuming that the doctrine of laches imposed by state law is applicable to the federal claims generally, the doctrine would still not bar those claims, as the Plaintiffs have alleged facts demonstrating that any delay by them in filing their claims was excusable. See *Ex parte Grubbs*, 542 So. 2d 927, 929 (Ala. 1989) (stating that to show undue delay, it must be the case that the plaintiff "delayed in asserting his right or claim, that his delay was [inexcusable], and that his delay caused the [defendant] undue prejudice").

D. McCarran-Ferguson Act.

The Defendant next argues that the McCarran-Ferguson Act bars the type of section 1981 and section 1982 claims at issue in this suit. Section 2 of the McCarran-Ferguson Act provides that "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such

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8. Liberty National has not shown that a rule of repose such as that existing in the State of Alabama exists in a majority of states. The Court is of the opinion that Alabama and its citizens should not be able to opt-out of federal claims from which other States and their citizens cannot opt-out merely because Alabama has put in place a rule terminating all state-law claims after a certain number of years.

Act specifically relates to the business of insurance . . . ." 15 U.S.C. § 1012(b). "The McCarran-Ferguson Act thus precludes application of a federal statute in face of state law 'enacted . . . for the purpose of regulating the business of insurance,' if the federal measure does not 'specifically relat[e] to the business of insurance,' and would 'invalidate, impair, or supersede' the State's law." *Humana Inc. v. Forsyth*, 525 U.S. 299, 307 (1999). See *BancOklahoma Mortg. Corp. v. Capital Title Co., Inc.*, 194 F.3d 1089, 1098 (10th Cir. 1999) ("the Act bars the application of a federal statute if (1) the federal statute does not specifically relate to the business of insurance; (2) a state statute has been enacted for the purpose of regulating the business of insurance; and (3) the federal statute would invalidate, impair, or supersede the state statute"). There is no question here that neither section 1981 nor section 1982 of Title 28 specifically relates to the "business of insurance," as considered by the Act. See *United States Dept. of Treasury v. Fabe*, 508 U.S. 491, 497 (1993), and *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129 (1982). Further, Liberty National contends, Alabama has enacted a statute related to the business of insurance that proscribes what it terms "unfair discrimination" in the provision of such insurance:

> (a) No person shall make or permit any unfair discrimination between individuals of the same class and equal expectation of life in the rates charged for any contract of life insurance or of life annuity, or in the dividends or other benefits payable thereon or in any other of the terms and conditions of such contract.

> (b) No person shall make or permit any unfair discrimination between amount of premium, policy fees or rates charged for any policy or contract of disability insurance, or in the benefits payable thereunder, or in any of the terms or conditions of such contract or in any other manner whatever.

Ala. Code § 27-12-11.

Therefore, the relevant question before this Court is whether the section 1981 and 1982 claims that the Plaintiffs seek to bring would "invalidate, impair, or supersede" the State statute. Interpreting what the Act meant by "invalidate, impair, or supercede", the Supreme Court, in *Forsyth*, held that "[t]he following formulation seems to us to capture that meaning and to construe, most sensibly, the text of § 2(b): *When federal law does not directly conflict with state regulation, and when application of the federal law would not frustrate any declared state policy or interfere with a State's administrative regime, the McCarran-Ferguson Act does not preclude its application.*" 525 U.S. at 310 (emphasis added). This Court concludes that the type of discrimination claims brought by the Plaintiffs in this action do not conflict with or frustrate Alabama's scheme of insurance regulation. Rather, the application of the civil rights laws in this context merely bolsters the State's anti-discrimination policy, set forth in § 27-12-11 of the Alabama Code of 1975. See also *Mackey v. Nationwide Ins. Companies*, 724 F.2d 419, 421 (4th Cir. 1984). As such, the Plaintiffs claims are not reverse preempted by state insurance law under the McCarran-Ferguson Act.

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E. *Burford* abstention.

Liberty National finally asserts that the federal claims should be dismissed under the *Burford* abstention doctrine. In *Boyes v. Shell Oil Products Co.*, 199 F.3d 1260, 1265 (11th Cir. 1999), the Eleventh Circuit Court of Appeals provided the following explanation of *Burford* abstention:

> The decision that gave Burford abstention its name is *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). In a later case, the Supreme Court summarized Burford abstention as follows:
>
> > Where timely and adequate state-court review is available, a federal court sitting in equity must decline to interfere with the proceedings or orders of state administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.
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> *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 361 (1989) (citations and internal quotations omitted).

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> The purpose of Burford abstention is to "protect [ ] complex state administrative processes from undue federal interference . . . ." *Id.* at 362.

However, a district court should be hesitant to apply the doctrine of *Burford* abstention to a case, as it is " 'an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it' and may be invoked only in those 'exceptional circumstances' in which surrendering jurisdiction 'would clearly serve an important countervailing interest.' " *International College of Surgeons v. City of Chicago*, 153 F.3d 356, 360 (7th Cir. 1998), *on remand from City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997). The central concern of *Burford* abstention is to prevent federal courts "from deciding unsettled questions of state law that relate to a complex state regulatory scheme." *Id.* at 361.

Here abstention is not appropriate. First, any relief potentially ordered by this Court would not be " 'in any way entangled in a skein of state law that must be untangled before the federal case can proceed,' " *New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. at 361 (quoting *McNeese v. Board of Ed. for Community Unit School Dist. 187*, 373 U.S. 668, 674 (1963)). The Court, prior to determining whether Liberty National's rate-setting practices violated sections 1981 and 1982 of Title 28, need not examine their relation to state law. Nor would federal action in this case upset State administrative efforts to provide a uniform scheme of the provision of insurance. See *id.* There is no state administrative action being challenged in the case, but rather the alleged decision of the Defendant in this action to price its insurance products in a discriminatory fashion.

Appendix B

Conclusion

This Court finds that amendment of the complaint by the Plaintiffs would not be futile, not withstanding Defendant's challenge at the present stage of this litigation. Accordingly, the Court will GRANT the motion to alter or amend the judgment and to permit amendment of the complaint to state claims under sections 1981 and 1982. This amendment shall be effected on or before July 14, 2000. Further, if the Plaintiffs can assert facts demonstrating that their breach of contract claims arising out of the discontinuance of the debit route system for collecting premiums are timely, they may amend their complaint to allege such claims. Failure to appropriately re-plead the breach of contract claims will result in dismissal of those claims. Finally, upon reconsideration, the Court finds that the remaining claims of the Plaintiffs, while not barred by the statute of limitations, are barred by Alabama's rule of repose. As such, they are due to be DISMISSED, with prejudice.

If either party desires, the Court will enter a final judgment on the dismissed claims under Federal Rule of Civil Procedure 54(b). A party seeking the entry of final judgment on those claims shall file a motion to that effect with the Court on or before July 14, 2000.

DONE and ORDERED this 3rd day of July, 2000.

/s/ H. Dean Buttram, Jr.
H. Dean Buttram, Jr.
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED NOVEMBER 26, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 00-14507-HH

ELLEN GAYLE MOORE, on Behalf of Themselves and all Others Similarly Situated, FANNIE McCONNELL, on Behalf of Themselves and all Others Similarly Situated, ANITA BOWERS, on Behalf of Themselves and all Others Similarly Situated, SPENCER WILLIAMS, on Behalf of Themselves and all Others Similarly Situated,

Plaintiffs-Appellees,

versus

LIBERTY NATIONAL INSURANCE COMPANY,

Defendant-Appellant,

MUTUAL SAVINGS LIFE INSURANCE COMPANY,

Amicus Curiae.

On Appeal from the United States District Court for the Northern District of Alabama

Appendix C

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (Opinion_____, 11th Cir., 19__, __F.2d__).

Before: BIRCH, WILSON and FARRIS, Circuit Judges.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ Charles Wilson
UNITED STATES CIRCUIT JUDGE

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* Honorable Jerome Farris, U.S. Court of Appeals for the Ninth Circuit, sitting by designation.